Horwath & Co. d/b/a Gonzales Packing Company *and* General Teamsters, Warehousemen & Helpers Union, Local 890, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO. Cases 32–CA–10558 and 32–RC–2915

August 27, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 26, 1990, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent and the Charging Party Union filed exceptions to the judge's decision, and the Respondent filed an answering brief to the Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and to adopt the recommended Order.

We adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by soliciting its employees on the day before the election to wear or display antiunion ''NO'' stickers. Although the Respondent engaged in this conduct during the critical period of the representation election that the Union lost, the judge found that the Respondent's unfair labor practices did not rise to the level of objectionable conduct sufficient to warrant setting aside the election. We reverse this finding for the reasons set forth below.

The Board held in *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), that ''[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election.'' As the judge noted, the Board stated in *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), that:

> [t]he Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered ''the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.'' [Footnote omitted.]

The record here shows that Marcelina Quitevis supervised 50 to 60 employees, about half the eligible voters, in the Respondent's sorting and grading department. The judge found that the Respondent violated Section 8(a)(1) on the day before the election when Quitevis visited 10 eligible voters at their work stations and asked each if they wanted a ''NO'' sticker like those that antiunion employees had worn during the election campaign. In so concluding, the judge noted that ''Quitevis' unfair labor practice was committed repeatedly, with obvious calculation, [and] was likely to have been witnessed by most of the . . . employees in her department.'' The judge also recognized the closeness of the subsequent election in which the tally of ballots shows 52 for and 59 against the Petitioner, with 6 nondeterminative challenged ballots. Despite the above factors, the judge found that he could not ''envision how Quitevis' conduct could possibly have interfered with [the election] . . . .''

Contrary to the judge, we conclude that the Respondent in this case engaged in objectionable conduct that warrants setting aside the election. We rely on the nature of Quitevis' conduct, its proximity in time to the election, the number of employees that Quitevis solicited that day, the likelihood that many of the 40 or 50 other employees in Quitevis' department may have witnessed her repeated unfair labor practice, and the closeness of the election. For these reasons, this is not a case where it is ''virtually impossible'' to conclude that the Respondent's misconduct could have adversely affected the election results. Thus, we find that the present case is distinguishable from Clark Equipment, supra, which the judge cited in finding that the Respondent's unfair labor practice did not constitute objectionable conduct. In that case, the Board found that employer misconduct involving only 8 employees in a unit of 800 employees did not warrant setting aside an election that the union lost by almost 100 votes. The Respondent's conduct here, as stated, directly affected at least 10 employees, may have been observed by many other eligible voters, and involved an election that the Union lost by only 7 votes out of 111 unchallenged ballots cast. In finding that the Respondent has interfered with this election, we rely on *Pillowtex Corp.*, 234 NLRB 560 (1978), in which the Board found objectionable conduct under similar circumstances.[2] Accordingly, we shall set aside the elec-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although no party has excepted to the judge's dismissal of the complaint allegations involving the Respondent's labor relations consultant, Jose Ybarra, the Respondent pointed out in its exceptions that the judge made an inadvertent factual error in discussing these issues. In this regard, the judge found that employee Enedina Martinez' testimony concerned group meetings that Ybarra held on August 16–18, 1989, whereas the record shows that the Respondent's plant manager, Tim Horwath, conducted meetings on those dates and that Ybarra's meetings were held at an earlier time.

[2] See also *Lott's Electric Co.*, 293 NLRB 297 (1989); *Maremont Corp.*, 251 NLRB 1617, 1623 (1980).

tion held in the representation case and direct a second election.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Horwath & Co. d/b/a Gonzales Packing Company, Gonzales, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held on August 23, 1989, in Case 32–RC–2915 is set aside and that this case is severed and remanded to the Regional Director for Region 32 for the purpose of conducting a new election. The Regional Director shall include in the Notice of Election the following paragraph:

NOTICE TO ALL VOTERS

> The election of August 23, 1989, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

[Direction of Second Election omitted from publication.]

MEMBER OVIATT, dissenting in part.

Unlike my colleagues, I would adopt the judge's decision in full, overrule the Union's remaining objection, and certify the results of the election. The day before the election, sorting and grading floorlady Quitevis admittedly picked up a roll of stickers already bearing the legend ''NO,'' and asked some 10 employees if they wanted one. Similar stickers had been in use by employees during the campaign for some time. Employees had written in antiunion legends on them, and ''had plastered many similar stickers around the packing shed, on walls, forklifts, bathroom mirrors, etc.'' They had also circulated stickers among their fellow workers, and many were already wearing ''NO'' stickers on their clothing at the time. Employees testified that Quitevis was ''friendly,'' made no demands, threats, or promises, and took no umbrage when rebuffed.

In this circumstance, I agree with the judge that Quitevis' conduct did not interfere with private choice at the ballot box, and in the absence of other violations, I would overrule the objection.

Elaine D. Climpson, Esq., for the General Counsel.
Robin L. Kubicek, Esq. (Niesar, Pahl, Cecchini & Gosselin), of San Francisco, California, for Respondent Gonzales Packing Co.
Michael A. Johnston, Business Representative, of Salinas, California, and (on brief) *Geoffrey Piller, Esq. (Beeson, Tayer, Silbert & Bodine)*, of San Francisco, California, for Charging Party Teamsters Local 890.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. On August 23, 1989,[1] 111 employees of Gonzales Packing Company (Respondent) cast unchallenged ballots in a representation election held under Board auspices; 59 voted against continued representation by Teamsters Local 890, and 52 voted for it, a margin of defeat that made it unnecessary to resolve challenges made to the eligibility of 6 additional voters.[2]

These consolidated cases, which I heard in trial at Monterey, California, on February 21–23, 1990, commonly focus on three separate acts of alleged misconduct by agents of Respondent during campaigning in the month before that election. The General Counsel has issued an unfair labor practice complaint alleging that in these incidents Respondent's agents interfered with, restrained, or coerced employees in the exercise of protected rights and thereby violated Section 8(a)(1). The Union has filed objections to the election which ultimately rely on these same alleged incidents.[3]

The complaint, as amended at trial, alleges materially that,

> [Par. 6(a)(1)1 (i): On an ''unknown'' date in ''late July, ''Respondent's ''Labor Consultant,'' Jose C. Ybarra, ''threatened employees that if they continued to support the Union, Respondent would file for bankruptcy, close its facility and cease doing business,'' and (ii) ''impliedly promised to pay employees better wages if they voted against the Union.''
>
> [Par. 6(a)(2)] (i): On an ''unknown'' date in ''early August,'' Ybarra ''interrogated employees regarding their Union sympathies,'' and (ii): ''impliedly promised to grant wage increases to employees if they voted against the Union.''
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> [Par. 6(b)]: On August 22, Respondent's ''supervisor,'' Marcelina Quitevis, ''interrogated employees by asking them whether or not they wanted to wear an anti-Union, 'No' sticker.''

[1] All dates are in 1989 unless I specify otherwise.

[2] The voting unit included approximately 127 employees eligible to vote. 118 persons actually cast ballots: 1 was declared void, 6 more were challenged on eligibility grounds.

[3] The Union filed objections to the election in Case 32–RC–2915 on August 30, and filed unfair labor practice charges in Case 32–CA–10558 on September 7. After investigating, the Regional Director for Region 32, in his role as an agent of the General Counsel, issued a complaint in the latter case on November 15. Nearly concurrently, the Union withdrew all objections except those that corresponded to the amounts in the complaint. On November 21, in his role as an agent of the Board, the Regional director issued a report on objections in the former case and, finding that the outstanding allegedly objectionable matters were ''substantially similar'' to the matters alleged in the complaint, he ordered these cases consolidated.

Respondent admits that the Board has jurisdiction over its operations, that Jose C. Ybarra and Marcelina Quitevis were its agents, and that Quitevis was, moreover a ''supervisor'' of voting unit employees within the meaning of Section 2(11) of the Act, but denies that either of them committed unfair labor practices as alleged, or that their conduct impaired the validity of the election.

Based on my study of the record and the parties' briefs,[4] my observation of the witnesses, my assessments of the inherent probabilities, and my review of relevant legal authority, I reach the following

FINDINGS AND RECOMMENDED DISPOSITIONS

I. BACKGROUND

Respondent, a familyowned business, is a tomato packing operation in Gonzales, California; its principal day-to-day managers are Tim Horwath and his wife, Melanie Horwath.[5] In late August, at the peak of its July 1–October 31 season, about 127 workers, many of whom comfortably speak and understand only Spanish, were employed at the Gonzales packing shed. The operation includes several small departments, such as the ''box shop'' (seven employees) and one large one, ''sorting and grading,'' where, typically, 50–60 workers,[6] all women, face each other across the various conveyor lines or tables used for different sorting and grading tasks. There, admitted Supervisor Marcelina Quitevis, the ''grading foreman,'' or ''floorlady,'' is directly in charge.[7]

For at least 20 years under Horwath family management, Respondent had recognized and contracted with the Union as the representative of its production and maintenance employees at the Gonzales' shed. Their most recent (1986–1988) labor agreement was due to expire on November 1, 1988. On that date an employee filed a decertification petition in Case 32–RD–890, but on January 6 the Regional Director determined that the petition was not supported by a valid showing of interest, and he therefore dismissed it. Respondent sought the Board's review of this dismissal. In the meantime the Union had filed a charge in Case 32–CA–9991 alleging that Respondent had unlawfully withdrawn recognition. The Regional Director found merit in that charge and apparently issued a complaint.[8]

On March 9 Respondent and the Union composed those cases, with the Regional Director's approval, by entering into a private ''Agreement.'' The Agreement provided that Respondent would withdraw its request for review in the dismissed RD case and the Union would withdraw its charge in the CA case, that an election would be held during the week of August 20, at the peak of the upcoming season, and that, in the meantime, the expired labor agreement would be treated as ''continue[d] in its entirety on a day-to-day basis,'' with special provisions and understandings to govern the Union's ''access'' to the plant and its employees. It was pursuant to this Agreement (and through the intervening procedural device of the instant petition in Case 32–RC–2915, filed by the Union) that the now-disputed August 23 election was held.

II. THE CAMPAIGN IN OVERVIEW

It will be easier to understand my analysis of the three incidents in question to understand first the general campaign setting in which those incidents occurred:

Jose Ybarra, charged with making unlawfully coercive statements during two separate meetings with small groups of employees, is a labor relations consultant to employers who speaks English and Spanish; he performed various election ''persuader'' services for Respondent, principally by conducting group meetings directly with employees on July 3 (the uncontested ''Welcome'' speech), July 21 and August 9 (the box shop meetings, the latter being the one that appears to be in contest), and August 16–18 (the series of ''Small Group'' meetings held with staggered groups of tomato sorters, one of which is contested). He also appeared on the dais and translated Tim Horwath's final series of three uncontested campaign speeches to larger groups of employees on August 16–18, and alone conducted a demonstration of voting procedures on August 22.

Gloria Tapia, the Union's bilingual business agent, invoked the Union's ''access'' rights, as confirmed in the parties' March 9 Agreement, and visited the shed regularly in the month of August (''on an almost daily basis,'' as the parties stipulated, in the final two weeks before the election). During these visits Tapia would meet with new hires, in confidential settings, such as a special office made available by Respondent for that purpose, or in a breakroom.

The employees received much written campaign propaganda from both sides, each piece printed in both English and Spanish. On this record, more written material seems to have been generated by the Union, whose agents and volunteers regularly distributed handbills outside the plant, than by Respondent, which seems to have relied more heavily on the captive audience meeting listed above to communicate its own messages, and to reply to the Union's campaign tracts. Much of Respondent's campaign is nevertheless ''documented'' in one form or another,[9] and, as may be inferred

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[4] I grant Respondent's unopposed motion to submit its ''amended brief'' out-of-time, in substitution for its timelyfiled original brief, which was incomplete due to unforeseeable mechanical problems.

[5] Respondent is owned by Steve Horwath; Tim Horwath, his son, is the plant manager; Melanie Horwath manages the office, oversees accounts, and performs a variety of hiring and other personnel functions typically associated with a seasonal vegetable processing operation, including maintaining and updating hiring rosters and seniority lists, recalling employees, and administering discipline.

[6] I rely on Marcelina Quitevis' consistent estimates for the finding that 50–60 employees worked in her department at relevant times. Respondent's counsel voiced some disagreement with Quitevis' testimony on this point, but counsel had ample time thereafter to do a search of relevant records and to demonstrate that Quitevis was mistaken when she so testified, if she was. Melanie Horwath's testimony, though purportedly linked to a recent review of records, was variously inconclusive, or obscured by irrelevant data, or based on her own personal estimates not necessarily related to her recent search of records; in any case, she does not obviously contradict Quitevis' estimates.

[7] Quitevis, like each of the other department ''foremen,'' is salaried and eligible to participate in a health insurance plan not available to employees in the voting unit. I discuss aspects of Quitevis' supervisory role in greater detail in section III,B.

[8] The complaint is not in evidence. Counsel for both sides see to agree in colloquy (Tr. 575–577) that Respondent had relied on the validity of the showing of interest supporting the decertification petition as the basis for withdrawing recognition from the Union, and that, in finding merit to the Union's charge, the director was relying on a judgment that the petition was not adequately supported, and not on any reason to believe that Respondent had given unlawful assistance to the RD petitioner, or had otherwise interfered unlawfully in the decertification movement.

[9] Ybarra and Tim Horwath worked from scripts, or at least ''outlines,'' in their uncontested speeches to large groups of employees; all three of Tim Horwath's final speeches (apparently the same basic speech, repeated to sepa-

Continued

from the summary above, much of that campaign has not been called into question in these proceedings.

Many of the themes used by Respondent throughout the campaign were evident in Ybarra's July 3 ''Welcome'' speech, delivered consecutively in English and Spanish, at a time when a substantial part of Respondent's peak complement had been recently hired. According to his script, Ybarra first spoke of the election to be held on August 23. Among other things, Ybarra expressed Respondent's ''hope that you will give the company an opportunity to prove itself to you[.] . . . to deal directly and openly with its employees instead of 20 having to go through an outsider.'' He warned employees that they could expect to hear ''a lot of promises from the Union,'' but should think of them as ''campaign promises,'' and should recall that ''the Company cannot and will not make promises . . . to its employees when there is an election pending[.]'' He emphasized that Respondent was free, however, to ''answer your questions and state its opinion[,]'' and encouraged employees, ''If you want to ask any question about what is going on during the Union campaign, you can ask your supervisor and/or office *or* you can write it out on a slip of paper and drop the question [anonymously, as he later stressed] in the box we have set up for this purpose near the time clock.'' He also sounded dual themes that were to resonate in later campaign tracts and other statements, thus:

> until the election . . . . [t]he Company is . . . obligated to follow all of the terms and conditions of the last Union contract. That means that you will continue to receive the Union negotiated wages of the contract. In addition, new hires must join the Union and pay Union dues. . . . Those employees who have been here past seasons must continue to pay Union dues. This obligation continues unless and until the Union is voted out.

In announcing that the employees would labor under the ''last'' union contract, originally negotiated in 1986, ''until the election,'' Respondent was aware (see Tim Horwath's August 4 letter, below) that the $4.50-per-hour starting rate established by that contract did not sit well with the new hires. And certainly the Union saw that rate as a potential campaign liability for the same reason. Thus, on July 29, the Union's Gloria Tapia wrote to Horwath (and simultaneously circulated English and Spanish copies among the electorate), claiming to have heard that Respondent's agents were telling employees that ''the Company would like to increase the pay of the new hires, but [was] unable to do so at this time because of the upcoming election, or because the Union is preventing it.''[10] Tapia then ''inform[ed]'' Respondent that,

> Local 890 will gladly agree to any wage increase for new hires, to take effect immediately. We feel that $4.50 per hour is far to [sic] low of a wage for any working person, and we intend to do everything possible to raise that wage in the upcoming contract negotiations.
>
> If the Company is sincere in its promise to improve wages for the new hires, you do not have to wait until after the election, you can do it now. All that you have to do is let the Union know, and we will sit down with you immediately to modify the union contract.

Writing in reply on August 4—and simultaneously distributing bilingual copies to the employees—Tim Horwath dismissed the Union's letter as ''ere campaign literature,'' one which nevertheless deserved a reply, ''so that the Company's position is clearly stated and not misrepresented in the future.'' Elaborating, Horwath ''agree[d] . . . that the current contract wage of $4.50/hour for new hires is 'too low[,]''' but cited the ''position'' of the ''NLRB'' that granting any wage increase during the pendency of the election would be ''an improper attempt to influence the employees' free choice,'' and would constitute ''objectionable conduct that may invalidate the upcoming election.'' And, asserting that ''Gonzales Packing is striving to create an election atmosphere where the employees are allowed to exercise their rights freely and without improper influence,'' Horwath judged that ''to increase wages at a time when an election date is 80 close—August 23—runs a very real risk that the NLRB will invalidate the election.'' Then, after denying that the company had yet made any ''promise'' of a wage increase, and that the ''National Labor Relations Act'' would ''prohibit'' such a promise, Horwath closed by ''set[ting] the record straight,'' as follows:

> I have been receiving a number of questions from our employees about . . . a wage increase. My response . . . is as follows. I agree a wage increase is a good idea, but I cannot promise anything at this time because there is an election pending.

I digress to emphasize that, however debatable in these unique circumstances might be the applicability of the legal principle that Horwath professed to rely on in declining to grant a preelection wage increase, the General Counsel had full opportunity to evaluate Respondent's admitted conduct in this regard, and has chosen not to challenge it as unlawful. The only claim raised in the complaint or the outstanding objections relating to Respondent's posture on the matter of wage increases is that Ybarra, in two different small meetings, took this subject a distinctly unlawful step further, by making other statements which ''implied'' that ''better wages'' would come only if employees would vote out the Union. Because it has not been called into question by the prosecuting parties I will assume for all purposes below, without deciding, that Respondent's admitted position, as reflected implicitly in Ybarra's July 3 ''Welcome'' speech, and explicitly in Tim Horwath's August 4 letter, was lawful and unobjectionable.

Also relevant to contested issues is a union handbill distributed on August 15 in which Ybarra was referred to as ''El Gordo,'' and as a ''professional union buster'' who ''specializes in attacking the unions of his own Raza [and who] . . . charges thousands of dollars to companies like Gonzales Packing for his dirty work.'' The handbill went on to suggest that Respondent saw Ybarra's services as an ''in-

rate groups over the August 16–18 period) were tape-recorded, although the question-and-answer sessions at the conclusion of each speech were not recorded; and, of course, Respondent's own campaign letters and handouts were another source of documentation about the overall themes emphasized by Respondent. These materials were furnished to the Regional Director during the investigation of these charges and objections.

[10] The alleged statements by management agents referred to in Tapia's letter are not a subject of this prosecution.

vestment,'' one that Respondent, ''like any good businessmen,'' would seek to ''profit from,'' ''How? Probably by cutting the wages for the seniority people.'' The handbill stated further that ''Jose and Tim are promising all kinds of wonderful things if we vote out the Union,'' but observed that Respondent would not give any ''guarantees,'' then asserted,

> They know as well as we do that if there is no Union the Company can do anything. They can fire anyone, they can cut wages, they can do whatever they want.

Finally, I deem it relevant to summarize what Tim Horwath said in his series of uncontested speeches to larger groups of employees (about 40 employees attended each one) in the period August 16–18.[11] There, Horwath again emphasized themes admittedly raised as well in the smaller group meetings conducted primarily by Ybarra, and again used the forum to reply to the Union's recent handbills. Thus, Horwath stressed that his family had run the business for three generations, and that Respondent had consistently obtained more work for the employees by expanding the number of growers with whom it contracted, and he then asked rhetorically, ''Who is the one that provides you with wages and security?'' In similar vein, responding to Union tracts touting the Union's achievements for workers at another packing operation, Horwath asserted that truckdriving work had been contracted out by that packer, and that drivers had ''lost their jobs,'' and again asked rhetorically, ''What security did the Union offer them?'' And, citing another example of a packer who had ''closed [its] operation'' after many years of dealing with the Union, Horwath stated, ''Our family has been here for three generations, and plan to be here for ten generations to come, with or without a union contract.'' In approximately midspeech, Horwath referred to the Union's prior claims that ''Jose and I have been promising wonderful things, or that without a union contract we can cut wages and fire anyone,'' and then insisted:

> First: We haven't promised anything because it is against the law to do so while an election is in effect . . . .
>
> Second: We will never fire anyone without good cause. . . . The law requires it [and] you are protected by the law.
>
> Third: What kind of business would we be to cut wages . . .? [We] would have an unhappy work force that would be nonproductive. In the past this company has never taken away anything they have given the people.

And, after some digressive attacks on the Union's bona fides, Horwath stated,

> All we are asking for is a chance to prove [ourselves]. We are not liars: we have integrity and good will, and have had for the past 40 years, and would like an opportunity to talk and deal directly with you, without the interference of a third party that has nothing to lose.

Nearing his conclusion, Horwath made familiar suggestions that the Union only wanted employees' dues money, and that its treasury was already swollen, and closed his prepared remarks with these words: ''Do they really need your 16 dollars? Vote No.''

III. SPECIFIC ALLEGED MISCONDUCT

A. *By Ybarra*

Although the testimonial record leaves room for much doubt about many particulars, it is at least clear that the counts in complaint paragraph 6(a)(1) and (2) about what Ybarra allegedly said in ''late July'' and ''early August,''[12] are intended to address Ybarra's conduct in two separate meetings, one of them with box shop employees (apparently the August 9 one), and the other with a small group of about six tomato sorters, one of many such small meetings convened in the August 16–18 period. And, on brief, the General Counsel specifies further that Ybarra's alleged unlawful ''interrogation'' occurred in the box shop meeting, along with Ybarra's alleged ''implied promise'' to raise wages if the Union were voted out, and (despite the ''late July'' reference in the complaint) that it was in one of the August 16–18 meetings with a certain group of tomato sorters that Ybarra allegedly threatened ''bankruptcy,'' and ''closure,'' and (a second time) made an ''implied promise'' to raise wages if the Union were voted out.

1. Box shop meeting(s)

The General Counsel called two employees from the box shop, Rudy Jimenez and Javier Uribe Pelayo. Jimenez, who speaks English and Spanish, testified that Ybarra conducted this meeting alone. largely in English, and that Tim Horwath was not present until ''after'' Ybarra had concluded his remarks, and then only to make an impromptu remark to the effect that he wished to ''deal [directly with employees] . . . rather than having the Union involved.'' Pelayo is not competent in English; he gave all evidence through an interpreter, and his information focuses on what Ybarra said in Spanish to him, while purportedly translating Tim Horwath's remarks in English to the group as a whole. (Thus, contradicting Jimenez at the threshold, Pelayo recalls that Horwath was the main speaker at the meeting in question.)

Apart from any other distinct problems with the testimony of each of these witnesses, I must observe at the outset that it is not even certain that they were both describing the same meeting, so inharmonious are the contents of their respective versions. And on brief, the General Counsel herself confesses unresolved doubt on this point, even while elsewhere claiming that Jimenez' account was ''corroborated'' by Pelayo. After much study of all the relevant testimony and assessments of the probabilities, I conclude that in those portions of their testimony relied upon by the General Counsel, these

[11] Here I rely on Horwath's speech outline (actually closer to a script); Horwath testified without contradiction that he followed this script without varying substantially from its handwritten text.

[12] [Par. 6(a)(1)] (i): On an ''unknown'' date in ''late July,'' Respondent's ''Labor Consultant,'' Jose C. Ybarra, ''threatened employees that if they continued to support the Union, Respondent would file for bankruptcy, close its facility and cease doing business,'' and (ii) ''impliedly promised to pay employees better wages if they voted against the Union.''

[Par. 6(a)(2)] (i): On an ''unknown'' date in ''early August,'' Ybarra ''interrogated employees regarding their Union sympathies,'' and (ii): ''impliedly promised to grant wage increases to employees if they voted against the Union.''

witnesses were both describing the same meeting, and that this was the one conducted on August 9. This was, I find also, the only one that Tim Horwath participated in; indeed, I find he led it, and that Ybarra served mainly to translate Horwath's remarks into Spanish for the benefit of Pelayo, the only non-English speaker in the department.[13] In this meeting, as all witnesses seem to agree, the atmosphere was informal, with workers standing at or near their machines or leaning on boxes and cartons while Horwath (pace Jimenez) made brief statements and responded as comments and questions emerged sporadically from the workers.

Setting aside his failure to recall Tim Horwath's central role in the meeting, Jimenez' testimony was otherwise fragmentary, vague as to context, inconsistent, and demonstrated overall that his purported recollection of key statements was often ore a product of subjective and careless interpretation than of genuine recall of the words ''Ybarra'' (or Horwath) actually used. He stated, for example, that Ybarra asked employees generally how they felt ''about the election.'' Later, showing no sign that he understood that there was a difference, Jimenez reported that Ybarra had instead asked how employees felt about ''the Union,'' then later agreed that it was ''election'' after all, then, still later, reverted to saying that Ybarra had asked employees how they felt about the ''Union.''[14] Other elements of his account are similarly defective and cause me to question how seriously I should take any of his attempts to reconstruct the actual words used by ''Ybarra.'' Thus, using significantly different and improbable formulations of Ybarra's statements in each attempted recounting, he first said that Ybarra remarked to the employees,

> . . . that maybe we thought with the union things could work out better there and we wouldn't have to be paying fines, you know—I mean the union dues. And that maybe we thought the union—the owner would try to pay the new people better.

This evolved eventually on cross-examination into a claim that what Ybarra had said was that ''the owner would pay the new employees $5 instead of $4.50 . . . [if employees would] vote the Union out.'' But elsewhere, Jimenez casually attributed the same statement to Tim Horwath in his series of uncontested speeches on August 16–18, summarized above, only to confess later that, in this instance, he was only referring to his subjective understanding of Horwath's remarks. I would not rely on Jimenez alone to rest a finding about what Ybarra or Horwath said.[15]

Pelayo's testimony at trial was even less helpful; indeed, he unconvincingly professed to have no recollection of any relevant matters.[16] Later, asked about a written declaration he had given to a Board agent on October 12,[17] he was anxious to claim that he had been ''confused'' when he the Board agent read it to him before he signed it. He nevertheless acknowledged that his affidavit represented the truth as he then recalled it. Without judging its weight, I received Pelayo's affidavit in evidence under the doctrine of ''past recollection recorded,''[18] and the General Counsel now relies

[13] Tim Horwath, echoed by Ybarra, convincingly testified that he was present at only the August 9 box shop meeting, and that he was present throughout it, all in response to a request voiced by employees to Ybarra in the July 21 meeting that Horwath be present at the next one. He further states convincingly that he was not at all present, not even briefly, at the July 21 meeting. Pelayo's recorded recollection (described further below) suggests that he was describing the second meeting (''15 days before the election''), even though he also stated his ''belief'' that it was ''the first meeting'' he was describing. Jimenez, who says he attended only one of the two box shop meetings, stated it was ''about two weeks before the election,'' and conceded that it was ''probably'' the one on ''August 9'' (Tr. 229:8–9; see also, 244:10). As I have described in main text, however, Jimenez also states that he did not recall Tim Horwath being present at this meeting until after ''Ybarra'' had committed the allegedly unlawful ''interrogation'' and had uttered the alleged ''implied promise'' to raise wages if the Union were voted out. But in describing such remarks by ''Ybarra,'' Jimenez eventually stated that these were made in the context of questions and remarks by two ''new'' employees, one of them being Carl Pollack. The exchanges involving Pollack and ''Ybarra'' described by Jimenez are in some ways similar to the transactions involving Pollack and Tim Horwath described (in radically different terms) by Tim Horwath and Ybarra. I can only conclude from the above, and from other threads and snatches of commonality in the otherwise widely disparate versions offered by the witnesses, that Jimenez, Pelayo, Tim Horwath, and Ybarra were all talking about the August 9 meeting, and that Jimenez' failure to recall Tim Horwath's central presence is symptomatic of his general unreliability, further discussed below.

[14] On brief, the General Counsel adopts Jimenez' most deliberate concession that Ybarra asked employees ''how they felt about the election.'' But even this question, she argues, violated Sec. 8(a)(1), a contention I discuss in my concluding analyses.

[15] Buried near the end of her discursive fn. 18 (Br. 21) is the General Counsel's acknowledgment that ''Jimenez' testimony was neither detailed nor a model of clarity.'' ''However,'' says the General Counsel, Jimenez was a ''cooperative witness,'' who had ''no vested interest in the proceeding'' (''unlike Horwath, who was prone to self-righteousness and exaggeration,'' and ''unlike . . . Ybarra, who was virtually incoherent and unable to remember anything . . . .'') I must observe that, elsewhere in that footnote (running from pp. 19 through 21 of her brief) the General Counsel nevertheless seems to accept large chunks of Tim Horwath's testimony for many purposes, even when they plainly contradict Jimenez; for example, Horwath's testimony that he was centrally involved in the August 9 meeting, and that he brought copies, inter alia, of his August 4 letter to Tapia (a wage increase is a ''good idea,'' but ''cannot promise anything at this time because an election is pending'') to the meeting, and repeated those notions in the meeting, particularly and emphatically in response to a suggestion from employee Pollack that (the employees would get an increase if they voted out the Union). In all these circumstances, I am not as reassured as the General Counsel is about the reliability of Jimenez' version(s) that Jimenez may have been a ''cooperative witness,'' or that he may have ''had no vested interest in the proceedings.'' Especially in ''company speech'' cases (see, e.g., *Christie Electric Corp*., 284 NLRB 740, 755–756 (1987)), these virtues are no substitute for coherency, consistency, and corroboration, all of which Jimenez' accounts lacked.

[16] There is no evidence that Respondent or its counsel did anything to contribute to Pelayo's unease as a witness, and I intend no such suggestion in the following remarks, but it was evident to me that Pelayo regretted ever having given an investigative statement in the first place, and that he had decided at trial to dummy-up; that is, to pretend to an almost total lack of recollection as the best means of ensuring that he could not be blamed for any finding or judgment made in this case. Neither do I readily accept as an explanation for his faulty memory at trial his self-deprecating admissions, encouraged by a series of questions by Respondent's counsel, calculated to leave the impression that Pelayo is merely dull-witted.

[17] Pelayo's original declaration, handwritten by a Board agent in Spanish, was read to him by the Board agent in Spanish: it bears the jurat of the Board agent that Pelayo signed it on October 12. A typed and conformed version of that declaration, translated into English by the same Board agent inconsistently records in the conformed jurat that Pelayo signed it on January 2, 1990. I presume that the October 12 date is the correct one, and that the January 2 date reflects an error.

[18] I now think I erred in this admissibility ruling. Out-of-court assertions made by Pelayo, in writing or otherwise, are hearsay under Rule 801(c), Fed.R.Evid., and therefore are inadmissible under Rule 802's proscription against hearsay, unless they may be admissible under a specific hearsay exception. Rule 803(5) provides an exception for certain types of ''recorded recollections.'' Among other things, that rule requires that the recorded assertion be ''shown to have been made or adopted by the witness when the matter was fresh in his mind.'' Pelayo's written declaration was given roughly 2 months after the event he was purporting to recall. Nothing in the circumstances would allow a finding that these events were ''fresh'' in Pelayo's consciousness when he gave his out-of-court declaration. In the circumstances, my findings below about the contents of Pelayo's declaration, and my discussion of the po-

on it, although with much equivocation. In that declaration, given two months after the event, Pelayo recalled, inter alia, that Tim Horwath (as translated by Ybarra) had said that he ''didn't promise anything,'' and that ''he couldn't raise the wages because there was still a contract, and that if he raised the wages he would be breaking the law[,]'' and that ''[h]e didn't say what they were going to do after the election.'' But Pelayo also recalled in this declaration—and this the General Counsel sees as ''corroboration'' of Jimenez—that Tim Horwath said in addition that he ''didn't promise to raise the ages, until the election was won'' (emphasis added).

Assuming that this formulation in English were the fair counterpart of what Ybarra, purporting to translate Horwath, said in Spanish to Pelayo, it would rather clearly imply that employees would have to vote out the Union to get a raise, and would violate Section 8(a)(1). But this string of words also substantially contradicts the balance of what Pelayo claims to recall that Ybarra said to him, especially that Tim Horwath ''didn't say what they were going to do after the election.'' At bottom, nothing in Pelayo's performance gave me any confidence that he could accurately reconstruct the precise words used by a company agent in remarks made two months before his recollection was first recorded. And, in the absence of any specific and coherent corroboration of Pelayo's recorded recollection, I would not rely on that part of his affidavit that suggests that Ybarra said that Horwath ''didn't promise to raise wages, until the election was won.''

I think it involves a kind of wishful thinking for the General Counsel to snatch raw pieces from the disparate testimony of each of these witnesses, and then to suppose that, despite their inherent inconsistencies, they have somehow established between the two of them that ''Ybarra'' (or Horwath) made an unlawful implied promise. I think it as probable as not on this record that all that Jimenez and Pelayo heard were mere repetitions of what Ybarra admittedly said in his July 3 ''Welcome'' speech, and what Tim Horwath said in writing to the Union's Tapia on August 4 on the subject of pay increases (a good idea, but no promises; employees will have to live with the ''Union-negotiated'' pay rates until the election is *over*). Such messages might well be understood by employees as suggestions that until the Union left the scene there could be no pay raises, but that is not literally what Ybarra and Tim Horwath said in those undisputed communications, and, as already noted, those communications are not being challenged in these proceedings. In any event, Jimenez and Pelayo were too confused and inconsistent on key points to reliably establish, prima facie, that ''Ybarra'' (or Horwath) made any unlawful ''implied promise'' in the box shop meeting(s). I would therefore dismiss that count in the complaint, and recommend that the corresponding objection be overruled. And I reach those judgments without determining whether Ybarra or Horwath were more credible in their denials that any such implied promise was made, much less attempting to make any findings about precisely what Ybarra (and Horwath) actually did say during those meetings.[19]

The only remaining question is whether Ybarra unlawfully ''interrogated'' box shop workers. The General Counsel adopts Jimenez' claim that Ybarra asked employees ''how they felt about the election,'' and I accept this for present purposes.[20] The General Counsel asserts that this question ''clearly constituted an interrogation as to whether the employees supported the Union or not . . . .'' She deems it significant in this regard that (according to Jimenez) two new employees (including Pollack) volunteered that they thought it was a ''good idea to vote the Union out because, you know, they didn't want to be paying the union dues and stuff.'' And, adding yet another factor to her analysis, the General Counsel concludes that, ''In conjunction with the promise of a wage increase, this inquiry [''how do you feel about the election?''] tended to be coercive and also violated Section 8(a)(1).

The General Counsel cites no plain authority for these various assertions, and I find them by no means self-evident.[21] In any case, I regard the issue raised by Jimenez' testimony as involving at bottom more a question of factual probabilities than of legal doctrine: Will it reasonably tend to ''interfere with, restrain, or coerce employees'' in the exercise of protected rights for an employer, in an informal group setting such as this one, to ask assembled employees how they ''feel'' about an upcoming ''election''? Contrary to the General Counsel's view, I think the answer is clearly ''No.'' In my assessment of the probabilities, such a question is more likely to be understood as a mere ''ice-breaker,'' an invitation to employees to say anything on their minds relating to the election that they might wish to divulge, but hardly the kind of question that would reasonably tend to cause employees to believe that they risk the employer's displeasure if they fail to respond, much less to believe that they must respond by disclosing their sentiments on the subject of union representation. I am similarly unpersuaded that it would matter to the analysis that some employees in fact may have responded by stating their opinion that they did not wish to be represented by the Union; the issue is whether the question would tend to ''coerce'' such a response. The record shows overall that employees were not shy about expressing pro or antiunion sentiments in these meetings, and it is therefore unreasonable to deduce that it was Ybarra's question, ''How do you feel about the election,'' that was the

tential legal impact of matters asserted by Pelayo in it, must be understood as hypothetical, or alternative, in character.

[19] I received into evidence on Respondent's proffer an affidavit given to the Board on October 12 by box shop employee Anthony Escobar, whom I deemed to be not currently ''available'' within the meaning of Rule 804(a)(5), Fed.R.Evid., because he had returned to Texas in the ''off'' season and his precise whereabouts there were not known nor reasonably knowable to Respondent, despite good-faith inquiry. Although an ''unavailable witness'' situation calls up a different set of evidentiary considerations, I now doubt the value as evidence of Escobar's written declaration, including for many of the same reasons discussed in the footnote concerning Pelayo's declaration. I nevertheless observe that Escobar's affidavit generally describes Ybarra's statements at both box shop meetings and furnishes some particulars of Tim Horwath's statements at the second of those meetings, and that Escobar's account of the second meeting is roughly harmonious with Tim Horwath's and Ybarra's accounts, but is by no means an attempt at a comprehensive recitation. Because I judge that the General Counsel's evidence through Jimenez and Pelayo did not establish a plausible prima facie case, I do not decide whether Escobar's affidavit deserves any weight.

[20] Ybarra specifically denied having asked such a question, but I place no stock in his denial, one of many uttered perfunctorily, especially when he admittedly—and understandably—could not at this date recall many details of his involvement in Respondent's campaign, only one of many he had conducted for various employers in the same industry within the previous 18 months.

[21] I have not independently sought to do the prosecution's research, but I doubt that even the most painstaking analysis of the thousands of potentially relevant Board cases would lead either to plain support for the General Counsel or plain refutation of her legal claims here.

''cause'' of the employees' antiunion statements in this instance, much less the ''coerced'' product of that question. Neither is it evident how such a question would tend to be ''coercive'' even if, elsewhere in the meeting, the employer may have made an unlawful (implied) ''promise of a wage increase''; this argument sounds like bootstrapping, and in any case I have found no reliable evidence that Ybarra or Horwath made such an implied promise.

Accordingly, insofar as the General Counsel admittedly relies solely on Jimenez' attribution to Ybarra of the question, ''How do you feel about the election?'' as the basis for the corresponding ''interrogation'' count in the complaint, I would dismiss that count, and, as well, the corresponding objection.

2. Tomato sorters meeting

The General Counsel relies solely on the testimony of Enedina Martinez, who is apparently fluent in English and Spanish, about a meeting she was called to attend, along with about five other tomato sorters, at which Ybarra presided. Martinez and Ybarra agree that the meeting lasted perhaps 30 minutes, and involved many questions and comments by employees (in Spanish) and many answers or other statements by Ybarra (uttered first in Spanish, then, at least sometimes, translated into English by Ybarra for the benefit of at least one employee in attendance who was not competent in Spanish). Although Martinez vaguely recalled that the meeting was about a ''month'' before the election, the General Counsel presumes, as does Respondent, and so do I, that she was referring to one of Ybarra's small group meetings in the August 16–18 period.

Martinez' account suggests overall that Ybarra in one way or another managed to repeat and emphasize the same themes to be found in Respondent's admitted campaign, summarized earlier (desirability of ''direct dealing,'' company wants a chance to ''prove itself,'' employees should not have to pay ''union dues,'' but company can't make ''promise,'' and cannot raise wages before election because it's illegal) and responded to specific (Union-inspired) ''rumors'' by reassuring employees that Tim Horwath had their best interests at heart and would not cut anyone's wages if the Union lost the election. Ybarra agrees generally that he repeated many of these themes in the small group meetings, though he admittedly could not recall details of many particular meetings, including this one.[22] Martinez favorably impressed me with the sincerity of her recollections and with her general ability to reconstruct events and many of their details, and to give a reasonably coherent account of the overall tone and flow of an event. And, as already noted, her account of Ybarra's remarks is generally harmonious with what Ybarra himself recalled, or with the themes that Respondent admittedly stressed in the campaign. It is on only two points that their testimony is substantially divergent. I will discuss each of these points separately.

First, Martinez recalled that at one point employee Victoria Perez stated her belief (in Spanish) that with a union the company (or companies in general, it is not clear which, from Martinez' varying accounts) would have to declare ''bankruptcy,'' or ''close'' the (their) operation(s). And Martinez recalls that Ybarra replied (in Spanish) to the effect that this ''could be'' or ''might be'' true.[23] Ybarra, by contrast, not only denies making any remarks resembling these, but denies flatly that the subject of bankruptcy or plant closure even came up in any of his small group meetings. On this point of credibility I have no difficulty rejecting Ybarra's denials; Martinez' recollection that some such exchange occurred seemed entirely genuine; Ybarra's denial was wooden and ritualistic. Even giving substantial credence to Martinez on this first point, however, I find it difficult to discern in her testimony anything that reasonably establishes the corresponding count in the complaint, that Ybarra ''threatened employees that if they continued to support the Union, Respondent would file for bankruptcy, close its facility and cease doing business.''[24] Martinez was candid in confessing memory lapses on some potentially important details of this transaction, and her inconsistent attempts to recount it leave in considerable doubt exactly what happened. The most that I could find is that in some manner Ybarra acknowledged the hypothetical possibility raised by an employee that a union's presence might have an impact on whether some employers stayed in business: Martinez' account does not provide enough reliable context to justify the conclusion that Ybarra's remarks would reasonably cause employees to fear that bankruptcy or plant closure *would* happen if Respondent's employees voted for continue representation by the Union. Moreover, even if some employees might have apprehended a more ominous message in Ybarra's replies to Perez, I find that Tim Horwath effectively dissipated any such implication in his own speeches to employees in the same August 16-18 period, when he unequivocally stated (emphasis added), ''Our family has been here for three generations, and plan to be here for ten generations to come, *with or without a union contract*.''

In these circumstances I would not find that ''Respondent'' made unlawful ''threats,'' as alleged in the complaint, and I would, therefore, dismiss the count in the complaint linked to this incident. And, for identical reasons, I cannot see in Martinez' account of these remarks any substantial grounds for overturning the election.

The General Counsel also seizes on another portion of Martinez' testimony to support the claim that in this meeting

[22] Respondent called one employee witness, Victoria Perez, to render her account of what Ybarra said in the particular meeting attended by Martinez. By her demeanor and the form of her answers Perez struck me as the most biased and disingenuous of all the witnesses who testified in this proceeding; she appeared overeager to volunteer testimony she believed favorable to Respondent and equally anxious to deny anything she believed might be unhelpful to Respondent's case. I give her testimony no weight whatsoever insofar as it concerns the ''small group'' meeting.

[23] Purporting to translate Ybarra's Spanish remarks into English, Martinez used a number of different formulations, such as, ''it would probably be true,'' or, ''that would happen.'' However, when pressed to recall the Spanish words used by Ybarra here, she consistently used ''poder,'' the future conditional mood of the Spanish verb ''poder,'' which the official translator rendered into English as ''could'' [be], or ''might'' [be]. Relying on the official translation, I deem it evident that Martinez was describing a remark by Ybarra that was decidedly are hypothetical and contingent in tone than any of Martinez' own purported translations would suggest.

[24] I note that on brief (at p. 33) the General Counsel now asserts, in contrast to the unqualified language of the complaint, that ''[b]y *acquiescing* in [employee Perez'] comments, Respondent [i.e., Ybarra] *impliedly* threatened employees with the *possibility* of its facility being closed or going bankrupt . . . .'' (Emphasis added.) Even taking this as the General Counsel's real contention here, I am not persuaded that Ybarra's remarks can reasonably be understood as even an implied threat about what Respondent would do if the employees voted to keep the Union.

Ybarra ''impliedly promised'' wage increases if the Union were voted out. Specifically, the prosecution appears to rely on Martinez' recollection that Ybarra said (in Spanish) that, ''I don't know what you want the union for. The only thing the union does is take our money away from us. And it doesn't do anything. The union doesn't do anything in order to help us. That the union was responsible for our wages.'' And, after further prodding by the General Counsel, Martinez recalled that Ybarra said (in Spanish; emphasis added), ''Tim wants to demonstrate to you that he can *do better by you than the union*. But . . . he can't make any promises. That we should—that Tim wanted us to give him a chance in order to prove himself to us.''[25]

I think it is evident from the foregoing that, even in this disputed instance, what Martinez purported to recall was in most respects strikingly similar to messages that Respondent admittedly conveyed in documented speeches and letters to employees, messages which the prosecuting parties do not challenge as unlawful or objectionable. And I believe it evident, moreover, that Martinez herself was only interpolating, rather than genuinely recalling verbatim what she heard. My favorable impression of Martinez notwithstanding, I could not accept any of her versions as literally accurate, and I cannot escape the belief that all she heard were essentially repetitions of what Respondent elsewhere admittedly said during the campaign. In any case, it was the prosecution's burden to establish otherwise, and this burden was not carried merely by presenting the testimony of one employee, however sincere, whose recollection of Ybarra's remarks in a specific meeting varied only slightly from the formulations repeatedly used by Respondent during the campaign. Employees' memories of the nuances of a company campaign speech are notoriously frail; the opportunities for misunderstanding and is recall are great; it is at least as likely as not that in recounting a particular formulation an employee will substitute his or her subjective understanding of certain remarks for the words actually used by the company speaker;[26] and these considerations make it perilous to pin a finding of violation on such testimony, especially when key details in that testimony are not clearly corroborated by anyone else in attendance. And even assuming the improbable, that Martinez' recollection were literally accurate, it still takes a rather attenuated process of analysis to discover in her reconstructions of Ybarra's remarks an ''implied promise that employees would get higher pay *only* if they voted out the Union.[27] Again, seen as a question of probabilities, I deem it unlikely that Ybarra's statements, as described by Martinez, would be taken seriously by employees as a promise of better pay conditioned on the election outcome; more specifically, I doubt that such statements would have any greater likelihood of being taken seriously by employees as such an implied promise than did Respondent's admitted communications on the subject. In the end, I think the General Counsel's contrary claims require a strained view of the context, and an undue reliance on the literal accuracy of only some of many of Martinez' admitted approximations of Ybarra's remarks. I would therefore dismiss the complaint insofar as it alleges that in the certain remarks described by Martinez, Ybarra made an unlawful promise of ''better wages if the Union were voted out.'' Similarly, I would not rely on Martinez' testimony to find that Respondent engaged in objectionable conduct requiring that the election results be set aside.

B. *By Quitevis*

1. Extent of her solicitations on August 22

This is what sorting and grading floorlady Quitevis admitted when examined by the General Counsel as an adverse witness at the start of the trial: As work was about to start on the morning of August 22, Quitevis picked up a roll of stickers she says she discovered on a counter in the office. The stickers, like those worn on lapels by conventioneers, already bore the written legend, ''NO.''

By that point Respondent admittedly had made blank sticker rolls available to employees known to be opposed to the Union, but only at their request, and those employees had written-in the antiunion legends on these and had plastered many similar stickers around the packing shed, on walls, forklifts, bathroom mirrors, etc. Those employees had also circulated the stickers among their fellow workers, and, at the tie Quitevis ''found'' an already marked roll of ''NO'' stickers on the morning of August 22, any workers were already wearing the on their clothing (in the cage of the Union's steward, Librada Quesada, derisively so, on her rump).[28]

Quitevis admittedly carried the roll of ''NO'' stickers to the shed floor where, over the course of the next hour, at least, she visited at least six workers at their various stations,[29] and asked each if they wanted one. Three said they did, according to Quitevis, and three others said they did not. In some cases Quitevis herself placed the sticker on the clothing of the workers who agreed to take one. Quitevis said that she limited herself to these six employees because they were long-tie coworkers: she also says that she already knew their sentiments, pro or con, on the subject of union representation because they had already expressed the to her

[25] Just as she had done previously, in recounting these remarks Martinez sometimes purported to translate Ybarra into English, with widely variant results. (For example, ''Oh, he said that Tim wanted to make an effort to give us, you know, all to be like a raise or something like that. He wanted to make an effort, but he couldn't promise anything. He couldn't promise us anything. The reason that our wages were so low was the union's fault. It's mostly because of the union's fault.'') The quotations above in main text reflect the official translation of what Martinez recalled when pressed to recite her recollection of the words Ybarra used in Spanish. I give no weight to any of Martinez' own purported translations of Ybarra's remarks made in Spanish.

[26] *Christie Electric*, supra, 284 NLRB at 755–756.

[27] Here, to accept the General Counsel's contentions, I would have to accept first, as literal fact, that portion of Martinez' account which has Ybarra saying that ''Tim'' wanted to ''do better by you than the Union,'' and then suppose that employees would, despite Ybarra's simultaneous ''no promises'' declarations (and Horwath's own similar emphatic declarations in larger meetings in the same August 16–18 period), infer that what Ybarra was talking about was ''better pay,'' and then suppose that employees would further infer that Respondent's real message was that the only way to better pay would be to vote out the Union.

[28] I here rely on the uncontradicted and mutually harmonious testimony of Tim Horwath and maintenance employee John Limos. Supplementing the above, those witnesses testified that Limos and several other outspoken antiunion employees, including Carl Pollack, made up and distributed scores of such ''NO,'' or ''NO UNION'' stickers, using company-supplied sticker rolls in at least some cases. Tim Horwath himself wore a ''NO'' sticker, and admits that he (or Melanie Horwath) furnished blank rolls of stickers to Limos, Pollack, and others when they requested them, and that he observed them later marking the with ''NO'' legends and distributing or posting the.

[29] Carmelita Rosario, Maria Jimenez, Martha Banuelos, Eleanor Robles, Ernestina Garcia, and Francisca Nunez.

in one way or another.[30] She said she did not ''remember'' having invited any new hires to take ''NO'' stickers, adding that she generally avoided the new hires because she had no particular familiarity with them. She admits that her activities were done in the presence of other employees, including new hires, working on the same lines and tables that she visited while offering stickers to the six individuals.

I find that Quitevis understated the extent of her solicitations. Thus, four additional employees not named by Quitevis,[31] three of the new hires, credibly testified that Quitevis likewise approached the in a similar manner, and some of those witnesses recalled further seeing and hearing Quitevis approach yet additional employees, including several new hires, and asking if they wanted to wear a sticker. These four additional employee-witnesses generally concede, however, that Quitevis was ''friendly'' in her approaches, made no demands, threats, or promises, and took no umbrage when rebuffed. And one of those witnesses, Yolanda Ramirez, recalls that after asking Ramirez if she wanted to wear the sticker, Quitevis added that Ramirez did not have to if she did not want to.[32] Quitevis was not recalled by Respondent to address this additional testimony, and I generally credit it.

2. Quitevis' function and level of authority

The ''level'' of authority of a supervisor is a ''factor'' in judging the lawfulness of his or her behavior towards employees under Section 8(a)(1), particularly so where, as here, it is alleged that the supervisor has committed an unlawful ''interrogation'' of employees.[33] This factor is also relevant in, deciding whether the supervisor's action, even if technically unlawful, would likely have an impact on the way employees would mark their secret ballots in the voting booth. Because of this, the parties, while not disagreeing that Quitevis was a supervisory agent of Respondent, spent much time litigating details of her role and work history.

Quitevis is one of the most senior of Respondent's personnel, having worked for more than 10 years on the grading floor as a member of the bargaining unit before assuming her present position a few years ago. She is fluent in both English and Spanish and, from all appearances, Spanish is the language of the grading floor. Respondent concedes[34] that Quitevis, ''directs the line, rotates workers on the line, gives instructions and training, and watches for grade.'' Claiming, however, that Quitevis is a ''low-level'' supervisor, Respondent asserts that ''She has no authority to hire, fire, grant leaves of absence. Her authority to discipline is limited to verbal warnings to new hires.''

Counsel for the General Counsel has vigorously resisted this ''low level'' characterization of Quitevis' supervisory status. But I observe that she did not contend nor seek to prove that Quitevis enjoyed a ''high,'' nor even a ''substantial'' level of influence over such matters as the hiring, or the job tenure, or the scheduling, or the wages, of employees in her department. And even if, in ''rotating'' workers, and in taking other discretionary actions necessary to maintain smooth production, she thereby ''affects'' employees' ''terms and conditions of employment'' in a more general sense, this only tends to prove that she is a ''supervisor,'' as Respondent admits, not necessarily one that has influence over the terms and conditions that are typically of central concern to employees.

If there is a debate at all about Respondent's quoted assertions, it is only as to the precise scope of Quitevis' ''authority'' to issue written or verbal ''warnings.'' On this point Quitevis, while straining to downplay her own role in employee disciplinary actions, substantially admitted that if she chooses to bring a problem with an employee to the office, this will trigger a written disciplinary warning to the employee. But the significance of this limited power to the ultimate debate is not evident to me. For one thing, it is not unusual for ''low-level'' supervisors to have such powers. For another, Melanie Horwath's undisputed and credible testimony shows generally that, while warning slips are some times issued, formal ''discipline'' for misconduct is virtually nonexistent (she testified that the company has fired no ore than three employees in the past 5 years, and then only for ''off the wall'' misconduct, such as when a drunken worker passed out in her office), and that even written warnings to employees have had no real impact on their tenure, or eligibility for recall or for pay increases (the latter being largely governed historically by the union contract in any case). Thus, even if Quitevis has in prior seasons directly issued some warning slips for routine infraction (e.g., ''tardiness''), and even if she has at least the power to ''effectively recommend'' that other written warnings be issued, it is not at all clear that these slips have had any real adverse impact on employees' hire, retention, or pay.

In the end, without treating it as a controlling factor in my analysis of the unfair labor practice issue, I deem it adequate to characterize Quitevis' ''level'' of authority as relatively ''low,'' consistent with her limited managerial function as a first-line supervisor in the main department of a routine processing operation, one who is universally recognized ag being part of the plant's ''management'' structure, but whose more specific function is largely limited to passing on higher-management's processing instructions and decisions, and making sure (mostly by nondisciplinary means) that the workers under her supervision are properly trained, assigned and reassigned, and doing their work correctly. And if the General Counsel's case depended on a finding, which I do not think

[30] Contrary to Quitevis, Martha Banuelos credibly testified that she had never spoken to Quitevis about her position concerning union representation before Quitevis admittedly offered her a sticker on August 22. The sane is true of sticker recipient Oralia Zavala (see below), who was not on Quitevis' list of the six persons who she admittedly approached. Moreover, as I find below, Quitevis invited others, including new hires, to wear a ''NO'' sticker, and there is no reason to suppose on this record that any of those employees had already declared their own sympathies. In addition, Quitevis admits that at least one worker declined the proffered sticker, despite Quitevis' belief that she was against the Union.

[31] New hires Oralia Zavala, Yolanda Ramirez, and Eva Melgoza, and second-season employee Enedina Martinez.

[32] The testimony of Respondent's witness Victoria Perez is to similar effect, but, for reasons already noted, I have no confidence in the sincerity of Perez' testimony about these events.

[33] The General Counsel and Respondent seem to agree that the lawfulness of Quitevis' solicitation of employees to wear ''NO'' stickers is to be judged under the ''total context'' standard applied to ''interrogations'' emphasized by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). For reasons discussed elsewhere below, I cannot fully embrace the notion that Quitevis' behavior was unlawful only to the extent it was interrogative in character, or that it is to be judged entirely in terms of the factors emphasized in *Rossmore House* as guides for deciding the lawfulness of interrogations.

[34] Br. 4 fn. 3.

it does, that Quitevis' level of supervisory authority was ''high,'' or even ''higher-than-average,'' I could not on this record arrive at such a finding.

Quitevis is, nevertheless, the supervisor of 50–60 employees, and she apparently gets that job done to Respondent's satisfaction. This implies at the least that she enjoys the respect and cooperation of employees she trains and supervises, and I may presume that her perceived authority as an agent of management has as much to do with her effectiveness as does her great experience and evident social skills. This would see especially true where, as here, the employees in her department were mostly new hires. (Thus, crediting Quitevis, of the 50–60 when she regularly supervised in the 2 months preceding the election, only a relatively gall number had been employed by Respondent in any previous seasons, and of these, fewer still had worked in previous seasons long enough to acquire ''seniority'' for recall and other purposes under the union contract.)[35] In short, the work force that Quitevis supervised during the period leading up to the August 23 election was composed largely of persons without any previous experience in the operation, without historical familiarity with the Union's representational role at the shed, and without such familiarity with Quitevis herself, other than as the person who embodied ''management'' on a day-to-day basis.

Conclusions

I have studied the many cases cited by the parties pertinent to the question presented by Quitevis' solicitations and actions; like the parties, I find them only generally instructive, not dispositive. Subject to some qualification, below, I further agree with the General Counsel and Respondent that the teachings of *Rossmore House*, supra, cannot be ignored, and that ''total context'' must be considered in judging the lawfulness or objectionability of the actions in question.

The precedents are harmonious on at least one basic point, that a central statutory vice in an employer's soliciting of employees to wear a procompany campaign emblem is that, like more direct forms of union-related ''interrogation,'' it puts pressure on employees openly to declare that which they have a right to withhold from their employer (and from their fellow employees)—their feelings about union representation.[36]

Notwithstanding this, it is neither per se a violation of Section 8(a)(1), nor does it require a rerun election, for an employer ''merely'' to make procompany emblems ''available'' to employees. Thus, in *Black Dot*,[37] the Board found no violation nor interference with the election where the employer ''merely provided a supply of [antiunion] buttons at a central location,'' where ''supervisors were completely absent from the distribution process,'' where there was no independent ''coercive conduct'' in connection with the buttons, and where the employer had declared in writing to all employees that wearing or not wearing a button was a ''purely personal and voluntary act which in no way will favorably [sic] or adversely affect any Black Dot employee.'' There, the Board has found it important that supervisors played no role in distributing the buttons, but in a number of other cases (which I think are just as obviously distinguishable from this case on their unique facts as is *Black Dot*), the Board has found no violation nor interference with the election even where supervisors *were* involved to one degree or another in making antiunion or procompany regalia ''available'' to employees.[38]

As I have noted earlier, the supervisors' distribution of ''Vote No'' buttons in *Catalina Yachts* is closer factually to Quitevis' actions here than in any other previously cited cases, and there a violation of Section 8(a)(1) was found. One arguably distinctive difference between this case and that one is that, unlike here, the Catalina supervisors brusquely ''instructed'' employees to wear the buttons. But in deciding the issue, the administrative law judge, affirmed by the Board, appears to have deemed it unnecessary to the violation that the supervisors had thus ''instructed'' employees; thus the judge wrote (emphasis added):

> By *tendering* the buttons to employees, *and apart from instructions that they be put on and in some instances pinning them on*, [the supervisors] ''in effect forced each employee who was approached, to manifest his choice,'' . . . which is improper.[39]

That cage thus stands as arguable precedent for a similar finding herein. But, concededly, the *Catalina* finding was made against a backdrop of more widespread violations, and arguably, those extraneous violations might have colored employees' responses to the particular supervisory actions found violative. And, to that extent, *Catalina* does not cleanly dispose of this case.

If *Catalina* is not fully dispositive, I must nevertheless note that attention has been called to no case in which it was found legally innocent for a supervisor to have done what Quitevis did; that is, directly to approach a substantial number of employees in her department and to invite those em-

[35] These were points in nominal contest throughout the trial, and they occasioned such on and off-the-record colloquy and review by counsel for both parties. When, early in the trial, Quitevis gave her estimate relied upon in main text findings above, Respondent's counsel indirectly attempted to distance herself from it, stating, ''we've got lots of records . . . . that could establish how many people started and left.'' But when Melanie Horwath was invited to testify on this point and related ones, and to disclose the fruits of her own private review of the ''records,'' She seemed artfully to avoid it. In the circumstances her vagueness on the central question how any sorters and graders were, essentially, ''new hires'' in the 1989 season can only invite an inference adverse to Respondent—that the company's records, if produced, would have supported Quitevis' estimate that very few of the sorters and graders as of that date had worked regularly, if at all, for the company before the 1989 season.

[36] *W. T. Burnett & Co.*, 273 NLRB 1084, and authorities cited at 1089 (1984). And see *Catalina Yachts*, 250 NLRB 283, 288 (1980), enfd. 679 F.2d 180 (9th Cir. 1982), involving supervisory distribution of ''VOTE NO'' buttons in some ways similar to that engaged in by Quitevis, but done under more aggravated general circumstances, including widespread additional violations of Sec. 8(a)(1) and (3), any of which might have sufficed to set aside the election.

[37] *Black Dot, Inc.*, 239 NLRB 929 (1978); see also *Farah Mfg. Co.*, 204 NLRB 173 (1973); *McDonald's*, 214 NLRB 879 (1974).

[38] *Daniel Construction Co.*, 266 NLRB 1090 (1983) (union supporters wore jackets with printed prounion logo; employer made jackets with procompany logos available for a price, and supervisors canvassed employees and offered to write down their names and sizes for orders); *W. T. Burnett*, supra, 273 NLRB at 1093 (''isolated'' act by supervisor in flipping procompany button on employee's workbench); *Jefferson Stores*, 201 NLRB 672, 673 (1973) (although supervisors generally distributed ''Vote No'' cards at the doors to the plant, the cards had no pins, and employees were obviously under no compunction to wear them, and were, indeed, told by employer to remove them when they started wearing them).

[39] 250 NLRB at 288. (Citations omitted.)

ployees on-the-spot to choose whether or not to display an antiunion slogan. Moreover, unlike in some cases cited above, I could not conclude on this record that Quitevis' solicitations, however ''friendly,'' were merely ''casual.'' Rather, from the nature, duration, and scope of her activities, I conclude that she consciously had set about to enlist greater numbers of employees in her department to join the ''NO'' campaign than had already chosen by that time (apparently voluntarily) to manifest their sentiments by wearing ''NO'' stickers. She seems to have been rather clearly bent on a mission not merely to encourage employees to vote ''No'' (not in itself an unlawful enterprise), but to beef-up the *showing* of ''NO'' sentiment in her department. By her own admission, it was not mere happenstance that she came into contact with employees while carrying her roll of stickers. Neither were her actions ''isolated''; she approached at least ten employees directly, and in view of many of the other workers arrayed around tables and lines in the vicinity. Indeed, the nature, duration, and scope of her activities make it likely that they were witnessed by most of the employees in her department.

What is not clear in the precedents, finally, is whether or to what degree it may be exculpatory in cases where a supervisor solicits substantial numbers of employees to wear antiunion devices that the employer's campaign was otherwise free from unfair labor practices, or that the supervisor who thus solicits employees did not voice any specific ''instruction,'' or utter any threat, or offer any blandishment, in connection with his or her invitation to employee to wear the device. Despite the absence of clarity in the cases on these points, I would not rely on those latter factors to excuse Quitevis' behavior as something less than a violation of Section 8(a)(1).

First, I suggest that the absence of surrounding coercion does not really neutralize the recognized coercion inherent in an ''interrogation'' of the type used by Quitevis. Her actions themselves tended to put at least some employees whose union views were not public in the uncomfortable position of making an open declaration one way or another, the very vice recognized expressly in the cases. Perhaps more important, even in the case of employees who may have previously voiced antiunion sentiments to Quitevis or to others, these particular types of solicitations involved more than ''mere'' questioning; they asked for much more than disclosure of union sympathies; they asked the targeted employee to take visible and immediate action, to play an active role in campaigning on the employer's behalf, to use her body ag a billboard for the ''NO'' message. And, as I elaborate next, this feature, in my view, elevate the level of ''pressure'' or ''coercion'' involved, and makes it largely irrelevant that the targeted employee may have earlier expressed an antiunion view by other means.

Under *Rossmore House*, a supervisor's ''friendly'' questioning of a visible and unabashed union advocate will not normally yield a finding that the questioning amounted to an unlawful ''interrogation,'' absent coterminous threats or promises, obviously unwanted persistence by the supervisor, or other ''independent'' aggravating factors.[40] Thus, it is presumed that such an open union advocate will not likely feel intruded upon, or be chilled in the pursuit of protected rights, simply because he is questioned about how open support for a union. But I think it involves the drawing of false parallels to apply the teachings of *Rossmore House* in the inverse manner proposed here by Respondent, to suppose, in effect, that Quitevis' activities, at least when directed to employees who had previously voiced antiunion sentiments, would have no ''coercive'' impact. Two things seem clear on this record; first, that the employees Quitevis approached had not yet chosen to distinguish themselves by wearing a ''NO'' sticker, whatever their private feelings; second—and this was made clear largely by Respondent's evidence—such stickers had already been made available through the widespread distributing of them by rank-and-file employees opposed to the Union. In the circumstances, the employees approached by Quitevis bad already given indirect indications of a sort that they were unwilling, for whatever reason, to become visibly associated with the ''NO'' movement. And especially in those circumstances, I believe, Quitevis' solicitations would tend to be seen as ''pressure'' from management to ''join the campaign'' even by employees who might have been otherwise disposed to vote ''No.''[41]

I would thus find that when Quitevis solicited employees to wear ''NO'' stickers, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act. Moreover, to remedy this violation in this seasonal packing operation requires, in my opinion, that Respondent post a typical notice not only for 60 consecutive days, but, more particularly, during a 60-day period where the largest number of employees will be exposed to it. For that reason, my recommended Order is specially tailored to direct that posting shall occur during the peak of Respondent's next full season after this Order becomes effective, to commence on a date to be determined by the Regional Director that will best effectuate these purposes.

The final question, assuredly the most important one to Respondent and the Union, is whether Quitevis' violations of Section 8(a)(1) require a rerun election.[42] Again, the cases cited by those parties do not unmistakably dispose of this question, but for reasons discussed next, I think a rerun is not warranted, and shall recommend that the Board accord finality to the representation question by certifying the results of the August 23 balloting.

While ''laboratory conditions'' continue to be the goal of every election conducted by the Board, and while the Board still acknowledges the *Dal-Tex* ''rule'' (a preelection viola-

[40] See, for example, *Clark Equipment Co*., 278 NLRB 498, 501 (1986), dealing with two situations, one lawful (involving Covington), one not (involving Bridges). Thus the supervisors' questioning of Covington, ''an open and active union adherent,'' was treated by the Board as an ''interrogation'' about union-related subjects, but not as an ''unlawful'' one where the affirmative messages conveyed by the supervisors were themselves lawful, and the ''circumstances surrounding [Covington's] interrogation were not coercive.'' By contrast, when a different supervisor interrogated Bridges, another ''open union supporter,'' the Board found a violation because the ''interrogation was accompanied by coercive comments, most particularly the unlawful threat to make examples of employees at this plant.''

[41] I could not find it exculpatory in the circumstances that Quitevis' actual powers were quite limited, or that she was a ''low-level'' supervisor. Clearly she was seen as an authority figure in her department, and the influence of that authority would be felt by employees, especially new employees, even in the absence of any regular resort by Quitevis to disciplinary action, or other extraordinary demonstrations of her powers.

[42] The General Counsel takes no formal position on this question, even while conceding at trial in her opening statement that, ''Essentially, we're here today to determine whether or not to set aside an election . . . .''

tion of Sec. 8(a)(1) is ''*a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election''[43]), the Board will not automatically require a rerun election when such violations have been found. Thus, in *Clark Industries*, supra,[44] the Board, while acknowledging *Dal-Tex*, also emphasized that,

> . . . the Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered ''the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.'' [Citation omitted.]

In attempting to apply these criteria, I recall my findings that Quitevis' unfair labor practice was committed repeatedly, with obvious calculation, was likely to have been witnessed by most of the 50–60 employees in her department, and occurred on the eve of an election that the Union lost by only 7 votes out of 111 unchallenged ballots cast.[45] And, admittedly, these considerations would seem to weigh in favor of applying the ''*a fortiori*'' rule of *Dal-Tex* and directing a new election.

Another consideration persuades me otherwise, however. Although Quitevis' behavior surely visited coercion on the targeted employees, it is less obvious how those actions might yield a greater harvest of ''NO'' votes when, with no one watching, employees marked their ballots. It is easier for me to imagine that such activity would yield a ''Yes'' vote, for it was inherent in Quitevis' actions that they imposed on employees' legitimate and statutorily-protected sense of privacy; and to that extent, they might have caused even employees otherwise disposed against the Union to view union representation more sympathetically, as perhaps the only bulwark against similar future impositions by their employer. But if that kind of thinking is unduly speculative, it is surely at least as speculative to presume otherwise, to imagine that somehow Quitevis' behavior could cause prounion employees, or even fence-sitters, to reach the judgment that union representation was a bad idea. Because I cannot envision how Quitevis' conduct could possibly have interfered with private choice at the ballot box, and in the absence of other violations or aggravating circumstances, I would overrule the objection linked to Quitevis' behavior on August 22.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[46]

[43] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).

[44] 278 NLRB at 505.

[45] I would characterize this as a ''close'' election result. I do not find it necessary to speculate about the significance of the six challenged ballots to this characterization, particularly where it is not a matter of record which party made the challenges, or why, or to whom. Clearly, if those ballots had been opened and counted, and had contained ''Yes'' votes, the Union's loss would have been truly a squeaker; but just as clearly, the Union's loss would have been even more decisive if the challenged ballots were all ''No'' votes.

[46] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[47] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

ORDER

1. The Union's objections in Case 32–RC–2915 are overruled.

2. Respondent, its officers, agents, and representatives, shall cease and desist from soliciting employees to wear or display antiunion slogans, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Gonzales, California packing shed copies of the attached notice marked ''Appendix.''[47] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act when our supervisor, Marcelina Quitevis, solicited some of you to wear antiunion ''NO'' stickers on August 22, 1989. The Board has ordered us to stop violating employee rights and to post and abide by this notice.

Section 7 of the National Labor Relations Act gives employees these rights.

> To organize
>
> To for, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit our employees to wear or display antiunion slogans or devices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed in Section 7 of the Act.

HORWATH & COMPANY D/B/A GONZALES PACKING COMPANY